

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

SUBJECT: Southern Indian Health Council
Docket No. A-99-45
Decision No. 1687

DATE: April 29, 1999

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE ORDER

The Southern Indian Health Council (SIHC) appealed a March 17, 1999 recommended order by Administrative Law Judge (ALJ) William E. Hammett granting the Indian Health Service's (IHS) motion to dismiss SIHC's appeal on the grounds of collateral estoppel and abatement. In his recommended order, the ALJ determined that SIHC's appeal had been rendered moot by a federal District Court's grant of summary judgment in an action against IHS brought by SIHC and several other tribal organizations, and that SIHC's proper avenue for relief would be to appeal the District Court's order.

SIHC's appeal before the ALJ challenged the September 17, 1998 decision of the Director of the IHS California Area Office (CAO) partially declining SIHC's proposal to renew its contract under the Indian Self-Determination Act (ISDA) to provide ambulatory health services to Indians in California. SIHC argued that the partial declination reduced the amount of funds for an existing self-determination contract in violation of ISDA provisions limiting the circumstances in which contract funding may be reduced in subsequent years.

As discussed below, I find that the ALJ erred in determining that the matter was moot, because the partial declination was not before the federal District Court, and the District Court's order on which the ALJ relied did not address the issues presented to the ALJ in SIHC's appeal concerning the application of 25 U.S.C. §§ 450j-1 (a) and (b)(2). I thus remand the case to the ALJ to afford SIHC the opportunity for a hearing on the

partial declination as provided in the applicable regulations.

Statutory Background

The ISDA, Public Law No. 93-638 as amended, 25 U.S.C. § 450f et seq., directs IHS to award "self-determination" contracts to tribal organizations to provide programs, functions, services and activities (PFSAs) for the benefit of Indians that had previously been provided by IHS. 25 U.S.C. § 450f. Section 450f(a)(2) provides that the Secretary of the Department making the award (the Department of Health and Human Services (HHS) or the Department of the Interior (DOI)) must approve a tribal organization's proposal for a self-determination contract unless the Secretary makes one of five specific findings, only one of which is applicable here: the Secretary may decline a proposal to renew a contract on the grounds that the amount of funds requested exceeds the applicable funding level for the contract as determined under section 450j-1(a). 25 U.S.C. § 450f(a)(2)(D). In such cases, the Secretary is still required to "approve a level of funding authorized under section 450j-1(a)." 25 U.S.C. § 450f(a)(2).

Section 450j-1(a) of 25 U.S.C. provides that the amount of funds awarded under a self-determination contract shall not be less than what would have been provided for the federal operation of the program covered by the contract. Moreover, section 450j-1(b)(2) also requires that, once a self-determination contract has been awarded, the amount of funds awarded for the contract in subsequent years shall not be reduced except in certain specified circumstances (such as reduction in federal appropriations for the contracted activity or completion of the activity).

A tribal organization whose contract proposal has been declined is entitled to a hearing on the record, with the right to engage in full discovery relevant to any issue raised. 25 U.S.C. § 450f(b)(3). The implementing regulations at 25 C.F.R. Part 900 provide for an opportunity for a hearing by an ALJ, at which the Secretary has the burden of proof to clearly demonstrate the validity of the grounds for declining the contract proposal. 25 U.S.C. § 450f(e)(1); 25 C.F.R. § 900.163. Any party to an appeal may then appeal the ALJ's recommended decision to the Secretary of HHS by filing precise and specific written objections to the ALJ's

recommended decision within 30 days after receiving it. 25 C.F.R. § 900.166. On August 16, 1996, the Secretary delegated her authority to hear such appeals to the Appellate Division of the Departmental Appeals Board.

Background of This Case

This case concerns the amount of funding SIHC was entitled to receive for its renewed ISDA contract. SIHC proposed to renew its contract to provide PFSA's for the period October 1, 1998 through September 30, 1999 for \$264,976, the same amount it received for the contract during the previous year. IHS instead awarded SIHC \$238,700 and issued a partial declination for the difference, \$26,276. IHS's letter dated September 17, 1998, advised SIHC that IHS was partially declining SIHC's proposed contract renewal because the amount of funding SIHC had requested was in excess of the applicable funding level for the contract as determined under section 450j-1(a). The letter noted SIHC's position that the partial declination violated section 450j-1(b)(2), which states that the amount of funds required for an ISDA contract shall not be reduced in subsequent years other than for specified reasons. The letter conceded that none of those reasons were applicable, but stated that reduction was permitted nonetheless because the amount SIHC had received in the previous year exceeded the amount to which it was entitled under section 450j-1(a).¹ SIHC then appealed to

¹ Section 450j-1(b)(2) of 25 U.S.C. states that the amount of funds provided for a self-determination contract shall not be reduced by the Secretary in subsequent years except pursuant to--

- (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
- (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
- (C) a tribal authorization;
- (D) a change in the amount of pass-through funds needed under a contract; or
(continued...)

the Interior Board of Indian Appeals on the grounds that the reduction in the funding amount violated section 450j-1(b)(2).²

IHS reduced the funding for SIHC's contract to account for an increase in the amount of appropriated funds that IHS, through its area offices, withholds from ISDA contracts to pay for federal administrative functions that cannot be contracted to tribal organizations. The parties referred to this amount as the "residual." The residual withheld to fund the administrative functions of the CAO, the IHS area office serving SIHC, is based on the size of the CAO's staff needed to perform those functions, and is taken into account in determining the funding level for all ISDA contracts awarded by the CAO. IHS Motion to Dismiss 3-4. For fiscal year (FY) 1998, the amount of SIHC's contract was determined using a residual for the CAO of \$1,700,000. For FY 1999, the CAO applied a residual of \$2,458,400, resulting in the reduced contract amount.

IHS argued before the ALJ that the \$1,700,000 residual was an estimate, an interim figure that the CAO applied to contracts with SIHC and only one other California tribal organization, with the understanding that funding for their contracts was subject to revision when the residual was finally determined. IHS stated that efforts to determine the residual began in 1994, when Congress amended the ISDA to permit tribal organizations to take over administrative support functions previously performed by IHS area offices, such as the CAO. The process of determining the residual was still ongoing when the CAO initially engaged in negotiations with SIHC to determine the amount of funds SIHC could receive annually under its ISDA contracts. IHS argued that the CAO subsequently developed the final \$2,458,400 residual and has thereafter applied it to every new proposal for administrative PFSAAs.

¹ (... continued)

(E) completion of a contracted project, activity, or program[.]

² Under the regulations, the Interior Board of Indian Appeals refers the case to the DOI Office of Hearings and Appeals, where it is assigned to an ALJ. 25 C.F.R. §§ 900.160, 900.161.

SIHC argued that IHS had committed itself through negotiations to continue to apply the \$1,700,000 residual figure to SIHC's ISDA contracts, and it contested the CAO's allegation that there was an understanding between it and the CAO that the figure was only temporary. SIHC also maintained that, in any event, the ISDA prohibited IHS from reducing the amount of its contract from what it received in the prior year.

In its partial declination letter, IHS stated that application of the higher residual was supported by the August 28, 1998 order of the District Court in California Rural Indian Health Board, Inc., et. al. v. Shalala, et al., No. C-96-3526 (N.D. Ca.) (CRIHB), a suit that SIHC, along with five other tribal organizations, filed in September 1996 to prohibit IHS from deducting the residual in determining funding levels for ISDA contracts. IHS Exhibit 7 of the ALJ record. The plaintiffs argued that the ISDA did not permit IHS to retain funds in the form of the residual to perform federal functions, and, even if it did, the record did not support the calculation of the \$2,458,400 residual retained by the CAO. Two of the plaintiffs (not including SIHC) also argued that IHS acted arbitrarily and capriciously because it used the \$1,700,000 residual in awarding ISDA contracts to SIHC and two other tribal organizations, while using the \$2,458,400 residual for other ISDA contractors in California.³ In August 1998, the District Court partially granted IHS's motion for summary judgment and dismissed the challenge to the residual. In language that the ALJ cited in his recommended order, the District Court wrote:

The court accepts defendants' assertion that the \$1,700,000 figure represented a preliminary estimate of the CAO's residual amount and was subject to adjustment after the completion of appropriate analyses. The CAO reached agreements based on the preliminary figure of \$1,700,000, but those agreements required modification once the CAO determined the actual residual amount. The change in the residual amount was neither arbitrary nor capricious, but simply a reflection of the completion of

³ IHS and SIHC disagreed over whether the \$1,700,000 residual was applied to two or three California tribal organizations.

CAO's budgetary analysis. Consequently, the amount withheld as the residual is neither an abuse of discretion, nor otherwise arbitrary or capricious.

CRIHB, Order at 11, August 28, 1998.

Citing this language, IHS moved for dismissal of SIHC's appeal before the ALJ, on the grounds that the issues raised by SIHC had already been decided by the District Court and that SIHC's appeal was thus barred by the doctrines of collateral estoppel and abatement.

Analysis

The Board's standard for review of an ALJ decision on a disputed issue of law is whether the ALJ decision is erroneous. The standard for review on a disputed issue of fact is whether the ALJ decision is supported by substantial evidence. The ALJ recommended dismissal of SIHC's appeal on the grounds that the issue of whether \$1,700,000 was the permanent residual or only a temporary figure had been rendered moot by the District Court's order in CRIHB. The ALJ wrote that he would be invading the province of the court and litigating a moot issue if he were to grant SIHC's request for a hearing and discovery on this issue. The proper avenue for SIHC, the ALJ stated, would be an appeal of the District Court's order and its holding that \$1,700,000 was not the actual residual to be used in determining the amount of SIHC's contract award.

IHS's motion to dismiss was based on collateral estoppel and abatement. Collateral estoppel is the principle that a party may not relitigate any issue actually and necessarily determined by a court of competent jurisdiction. See Montana v. U.S., 440 U.S. 147 (1979). For the doctrine of collateral estoppel to apply, the issue sought to be precluded must be the same as that involved in the prior litigation; that issue must have been actually litigated; it must have been determined by a valid and final judgment; and the determination must have been essential to the prior judgment. Haize v. Hanover Insurance Co., 536 F.2d 576, 579 (3d Cir 1976); *see* Virgin Islands Dept. of Human Services, DAB No. 980 (1988).

Collateral estoppel does not apply here because the argument asserted by SIHC -- that the reduction in funding for its self-determination contract violated the ISDA -- was not litigated before the District Court. When the plaintiffs filed their complaint in CRIHB, the CAO had not yet issued its final decision partially declining SIHC's proposal to renew its ISDA contract. IHS acknowledged it did not apply the higher residual to SIHC until after it received the favorable ruling on its motion for summary judgment. IHS Motion to Dismiss 5-6, 8. Since the reduction in funding for SIHC's self-determination contract had not occurred when plaintiffs filed their complaint, that issue was not before the District Court and, moreover, was not addressed by the District Court's order. SIHC would thus not be able to obtain the relief it seeks here by filing an appeal of the District Court's order as the ALJ suggested.

IHS argued before the ALJ that the issue presented here was fully litigated before the District Court. IHS cited the court's language that "[t]he CAO reached agreements based on the preliminary figure of \$1,700,000, but those agreements required modification once the CAO determined the actual residual amount," and asserted that the court was aware that the CAO was awaiting the court's direction as to whether it could apply the higher residual to SIHC. IHS Motion to Dismiss 6-8; IHS Reply to SIHC's Opposition to Motion to Dismiss 2, 6. IHS's argument is not supported by a reading of the order, which nowhere addresses the argument that SIHC asserted before the ALJ, that the reduction in funding for its contract violated the prohibition in section 450j-1(b)(2) on reducing contract funding in subsequent years. The District Court did in fact reject plaintiffs' challenge to the CAO's retention of the residual and its determination of the higher residual figure. The court also rejected the argument of two plaintiffs, not including SIHC, that IHS acted arbitrarily and capriciously by applying the \$2,458,400 residual to them while using the \$1,700,000 residual for SIHC and two other tribal organizations. However, the court did not address whether a decrease in funding for an ISDA contract in a subsequent year through application of the higher residual would violate section 450j-1(b)(2). This was a question which none of the parties raised before the District Court.

The District Court's order does refer to "agreements based on the preliminary figure of \$1,700,000" which "required modification once the CAO determined the actual

residual amount.” However, the context of the order shows that the court was referring to the CAO's agreements with tribal organizations to apply the \$1,700,000 residual on an interim basis, and did not refer to self-determination contracts such as the one at issue here. Immediately before the quoted language, the District Court cited the declaration of Paul Redeagle, a CAO employee who has served as Deputy Director and Acting Director and had been involved with contract negotiations with SIHC, in support of the court's finding that the CAO had initially estimated its residual to be \$1,700,000. The cited paragraph of the declaration states that the CAO and two tribal organizations, including SIHC, had agreed to use the \$1,700,000 residual to determine their contract funding because the CAO had not yet reached a final decision on the proper residual. Redeagle Declaration ¶ 5. Thus, the court was referring to these prior agreements, and not to SIHC's subsequent ISDA contracts, which would be subject to the purview of section 450j-1(b)(2).

As noted above, for collateral estoppel to apply, the issue sought to be precluded must be the same as that in the prior litigation, and must have been actually litigated. Hanover Insurance Co. The Ninth Circuit in Luben Industries, Inc. v. U.S., 707 F.2d 1037 (9th Cir 1983), cited by SIHC, reasoned that among the factors to be considered in determining whether a prior judgment is to be accorded conclusive effect are whether the parties were fully heard, and whether the court supported its decision with a reasoned opinion. *Citing* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Neither of those factors is present here. The court's order contains no indication that the principal issue that SIHC raised before the ALJ was considered. In the absence from the order of any discussion concerning the application of section 450j-1(b)(2) to the reduction in funding for SIHC's contract, I conclude that collateral estoppel does not apply, and that the ALJ erred in recommending dismissal of SIHC's appeal. ⁴

⁴ Even if I were to find that the District Court had ruled on the issue raised by SIHC, it is still not clear that a District Court ruling would support a finding of collateral estoppel here. IHS cited two federal appellate court cases for the principle that administrative agencies are bound by circuit court

(continued...)

IHS also argued before the ALJ that dismissal of SIHC's appeal was supported by the doctrine of abatement, which bars a second action based on the same cause between the same parties involving substantially the same subject matter, where there is a prior action pending in a court of competent jurisdiction. IHS Motion to Dismiss 13-15, *citing* 1 Am. Jur. 2d, Abatement, Survival and Revival § 6 (1994). As discussed above, the cause of action in this appeal, the partial declination of SIHC's ISDA contract for FY 1999, was not part of the action before the District Court, and the issues raised here were not addressed by the court. Accordingly, abatement would not apply here.

Conclusion

For the foregoing reasons, I modify the ALJ's findings of fact and conclusions of law to hold that SIHC's hearing request was not rendered moot by the order of the District Court in CRIHB. Accordingly, I remand the case to the ALJ to provide SIHC with an opportunity for a hearing as provided by 45 C.F.R. Part 900. This is the final administrative decision for the Department of Health and Human Services on this threshold matter.

M. Terry Johnson
Member, Department Appeals Board

⁴ (... continued)
precedent arising within their circuit. NLRB v. Ashekenazy Property Management Corp., 817 F.2d 74 (9th Cir. 1987); Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir. 1979). As SIHC pointed out before the ALJ, both of those cases involved the binding effect of circuit court precedent, and did not address the effect on administrative agencies of district court rulings. SIHC Opposition to Motion to Dismiss 10. IHS did not address this distinction in its reply to SIHC's pleading.